Supreme Court of the United States.

OCTOBER TERM, A. D. 1874.

J. SHERMAN HALL AND J. W. LYBRAND,
Plaintiffs in Error,

v.

RALPH A. LANNING, JAMES B. LAING, AND HENRY WELD,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF THE CASE.

This was an action of debt brought by the defendants in error against the plaintiffs in error, upon the record of a judgment obtained in the Supreme Court of the State of New York, held in and for the county of King, in said State of New York.

Mr. Lybrand, one of the defendants, in the court below filed three separate pleas. FIRST, *nul tiel record.* (Record, p. 5.) The second and third pleas are substantially alike. The third is as follows, viz. (Record, 5 and 6):

"And the said defendant, for a further plea in this behalf, says, *actio non*, because he says that at the time of the commencement of said suit in said Supreme Court

of New York, in which said judgment is alleged to have been rendered, the said defendant was, and ever since hath been, a resident, inhabitant and citizen of the State of Illinois; and that said defendant was not at the time of the commencement of said suit, nor at the time of the rendition of said supposed judgment, in the said State of New York; and said defendant further avers that he never was served with any process, summons, citation, or notice of any kind to appear in said court in which said judgment is alleged to have been rendered; and said defendant avers that he never authorized any attorney or any other person to appear for him in said cause in said Supreme Court of New York, and that said defendant never entered his appearance in said cause in person, and said defendant avers that said Supreme Court of New York never had any jurisdiction over the person of said defendant in said cause, and this the said defendant is ready to verify, wherefore," etc.

To the plea of *nul tiel record*, the plaintiffs filed a replication in which they re-affirmed the existence of the record, and concluded the replication with a verification *and prayer that the court might see and inspect the record.* (Record, pp. 7 and 8.)

To the second and third pleas, the plaintiffs filed the four following replications:

Replication No. 1 *to* 2*nd and* 3*rd pleas of deft. Lybrand.*

"And the said plaintiffs, by way of replication to the said pleas of said defendant Lybrand, secondly and thirdly above pleaded, say *precludi non*, because they say that an attorney, to wit: Oliver S. Ackley, did then and there appear for said defendants in said suit, in the Supreme Court of the State of New York, which said attorney was then and there duly authorized so to appear, and this the said plaintiffs are ready to verify; wherefore," etc. (Record, p. 9).

Replication No. 2 to 2nd and 3rd pleas of deft. Lybrand.

"And the said plaintiffs, by way of replication to said pleas of said Lybrand, secondly and thirdly above pleaded, say *precludi non*, because they say that the said action in the Supreme Court of the State of New York was on the joint indebtedness of said defendants to said plaintiffs, and process in said action was served on said defendant, Hall, and the said Hall then and there employed a certain attorney, to wit: Oliver S Ackley, to appear in said action, the said Hall having authority to make defense in said action for both himself and said Lybrand, and the said Ackley thereafter and before the recovery of said judgment, appeared in said action for and as the attorney of said defendants, Hall and Lybrand, and in their behalf, and the plaintiffs aver that said Ackley was by said defendants duly authorized so to appear for them; and this the said plaintiffs are ready to verify; wherefore," etc. (Record, pp. 9 and 10).

Replication No. 3 to 2nd and 3rd pleas of deft. Lybrand.

"And the said plaintiffs say that the said defendant, J. W. Lybrand, ought not to be admitted or received to plead the said pleas secondly and thirdly above pleaded by him, because they say that it appears by and in the said record (in above declaration mentioned) of said cause in the Supreme Court of the State of New York, to wit: the records in said cause, known as the judgment roll; that said defendants, Hall and Lybrand, did then and there, in the said Court, to wit: in said Northern District of Illinois, jointly appear in said cause, to wit: after the commencement of, and before judgment in the same, by Oliver S. Ackley, as their attorney, and by said Ackley, as their attorney, then, to wit: during the progress of said cause, and then, in said court, to wit: in said Northern District of Illinois, contest the same until said judgment therein for plaintiffs was obtained; and

that said defendants, by said Ackley as their attorney, did afterwards, to wit: after the rendering of said judgment in said court, and before the commencement of this present suit, to wit: in said Northern District of Illinois, consent and stipulate that said judgment should be reduced as in this cause it is alleged it has been reduced. And this they the said plaintiffs are ready to verify; wherefore," etc. (Record, p. 10.)

Replication No. 4 to 2nd and 3rd plea of defendant Lybrand:

"And the said plaintiffs say that the said defendant, J. W. Lybrand, ought not to be admitted or received to plead the said pleas secondly and thirdly above pleaded by him, because they say that by and in the judgment of said Supreme Court of the State of New York, in said cause, to wit: in said Northern District of Illinois, which said judgment is a portion of said records in above declaration mentioned, it is set forth, and said court found that said Supreme Court had jurisdiction in said cause of said defendants, Hall and Lybrand, "they having appeared in said court," to wit: said Supreme Court "by their attorney," And this the said plaintiffs are ready to verify; wherefore," etc. (Record, p. 11.)

To these replications to the defendant Lybrand's 2nd and 3d pleas, the following rejoinders were filed:

Rejoinder to replication No. 1 to Lybrand's 2nd and 3rd pleas:

"And the said defendant Lybrand, as to the first replication of the said plaintiffs to the second and third pleas of the said defendant Lybrand, saith that the said plaintiffs, by reason of anything in said replication alleged, ought not to have or maintain their aforesaid action thereof against the said defendant Lybrand, because he says that neither Oliver S. Ackley, nor any other attorney, was duly authorized to appear in said suit in the Supreme Court of the State of New York, for said defendant Lybrand, in manner and form as in said replica-

tion alleged, and of this the said defendant puts himself upon the country," etc. (Record, pp. 11 and 12.)

Rejoinder to replication No. 2 to 2nd and 3rd pleas of deft. Lybrand:

"And the said Lybrand, defendant, as to the second replication of the said plaintiffs to the second and third pleas of the said defendant Lybrand, saith that the said plaintiffs, by reason of anything by them in that replication alleged, ought not to have or maintain their aforesaid action thereof against the said defendant Lybrand, because he says that the said attorney, to wit: Oliver S. Ackley, was not authorized by the said defendant Lybrand, nor by said Hall, through authority derived from said defendant Lybrand, to appear in said cause for said Lybrand, or to make defense therein for him in manner and form as in said replication alleged. And of this the said defendant Lybrand puts himself upon the country," etc. (Record, p. 12.)

Rejoinder to replication No. 3 to Lybrand's 2d and 3d pleas:

"And the said defendant Lybrand, as to the third replication of the said plaintiffs to the second and third pleas of the said defendant Lybrand, saith that the said plaintiffs, by reason of anything in that replication alleged, ought not to have or maintain their aforesaid action thereof, against the said defendant, Lybrand, because he says that he never gave any authority to any attorney to appear for him, or to enter his appearance in said cause, in said Supreme Court of the State of New York, or to consent or stipulate for him, that the judgment entered therein should be reduced; nor did any attorney ever have any authority to appear for defendant, Lybrand, or to enter his appearance in said cause; or to enter into any stipulation in reference thereto, either before or after judgment; and the said defendant Lybrand, avers that the attorney who did appear for him in said

cause, and who did contest the same for him during the progress thereof, and who did after judgment, was obtained, consent and stipulate for him, that the judgment should be reduced, did each and every of such acts without authority; and this the said defendant is ready to verify; wherefore," etc. (Record, p. 14).

Rejoinder to replication No. 4 to Lybrand's 2d and 3d pleas:

"And the said defendant Lybrand, as to the fourth replication of the said plaintiffs to the second and third pleas of the said defendant Lybrand, saith that the said plaintiffs, by reason of anything in that replication alleged, ought not to have or maintain their aforesaid action thereof, against the said defendant, Lybrand, because he says that he never gave any authority to any attorney to appear for him, or to enter his appearance in said cause, in the said Supreme Court of the State of New York; nor has any attorney ever had any authority to appear for said defendant Lybrand, or to enter his appearance in said cause, and said defendant avers that the attorney who did appear for him in said cause did so without any authority, and this the said defendant is ready to verify; wherefore," etc. (Record, pp. 14 and 15).

The issues upon these rejoinders were made up by the plaintiffs, adding a *similiter* to the rejoinders, to the 1st and 2d replications, and filing a dumurrer to the other two. (Record, pages 12, 20 and 21).

On the 25th day of March, 1873, the court overruled the demurrers to Lybrand's rejoinders to the plaintiffs third and fourth replications to his second and third pleas, and the plaintiffs elected to abide by their demurrers. (Record, p. 21).

This left only three issues raised by Lybrand's pleas to be disposed of, viz:

The plaintiff's replication to the plea of *nul tiel record, which was an issue to be decided by the court.*

And the issues of fact raised by the rejoinders to the

plaintiff's first and second replications to Lybrand's second and third pleas—which issues were as to whether the defendant Lybrand ever authorized or empowered Oliver S. Ackley to appear for him in the said suit in the Supreme Court of New York.

Upon the trial of the cause, the plaintiffs simply introduced in evidence the record of the judgment in the Supreme Court of New York, and rested. (Record, p. 32.)

By the said record, it appeared that a summons was issued against J. Sherman Hall and J. W. Lybrand, when the said suit was commenced in the Supreme Court of New York, (Record, p. 24) and that Oliver S. Ackley appeared and answered for both defendants (Record, p. 26): the record does not show that the summons was served upon any one. The judgment is as follows (Record p. 31):

"Supreme Court of the State of New York.

"Ralph A. Lanning, James B. Laing, Henry Weld, *against* J. Sherman Hall, J. W. Lybrand.	Judgment, Sept. 30, 1872.

"This action having been commenced in the Supreme Court of the State of New York, a court having general and original jurisdiction, and being a court of record and having jurisdiction of the subject matter of this action and of the defendants, *said defendants having appeared in said court by their attorney*, and, after issue joined, said action having been referred by order of the court to E. C. D. Kittridge, Esq., as sole referee to hear and determine, and said referee having heard the proofs offered, and having filed his report, whereby he finds to be due from the defendants to the plaintiffs, and that plaintiffs are entitled to recover from the defendants, the sum of $2,505.72, and the plaintiffs costs and disbursements in this action having been adjusted by the clerk of this court at $432.05. Now on mo-

tion of D. G. Weld, attorney for the plaintiffs, it is ordered and adjudged that Ralph A. Lanning, James B. Laing and Henry Wild, the plaintiffs, recover from J. Sherman Hall and J. W. Lybrand, the defendants, the sum of $2,505.72, and the further sum of $433.05, for their costs and disbursements, making together the sum of $2,938.77. George G. Herman, clerk." (Record p. 31.)

Said record also showed the following (Record, p. 24):

"Supreme Court, Kings County.

"Ralph A. Lanning,
James B. Laing,
Henry Weld,
v.
J. Sherman Hall,
J. W. Lybrand.

At April term, at Brooklyn, Oct. 5. 1872.

Present, Hon. C. E. Pratt, Justice.

On reading and filing the consent of the respective attorneys, ordered, that the judgment in this action entered September 30, 1872, in favor of the plaintiffs against the defendants be reduced to $2,855.77; that this order or a certified copy thereof be annexed by the clerk of this court to the judgment roll in this action filed September 30, 1872; and that said clerk correct the docket of the said judgment by entering the amount as herein corrected, namely, $2,855.77.

Oct. 5, 1871, G. G. H. C. E. Pratt, J. S. C."
(Record, p. 24.)

The defendant Lybrand was then sworn and offered to prove that he never was a resident or citizen of the State of New York at any time, since, nor for a long time before, the commencement of the suit in which the judgment was rendered upon which the plaintiffs in this case brought suit, and that he never had any summons, process, citation, or notice of any kind either actual or constructive ever given or served upon him; and that he never authorized any attorney or any other person to

appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York, or to enter his appearance therein; nor did he ever authorize any one to employ an attorney to appear for him in the action in which such judgment was entered; and that he never entered his appearance therein in person, and that he knew nothing of the pendency of said suit in the said State of New York until the commencement of this suit in the Circuit Court. That said Lybrand was a partner in business with said J. Sherman Hall at the time the transactions occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved, and due notice thereof published some six months prior to the commencement of said suit in New York.

But the court refused to allow said evidence, or any of it, to be introduced, holding that the record introduced by the plaintiffs was *conclusive* evidence upon the issues before the jury. To which ruling the defendant Lybrand excepted. (Record, p. 32.)

And thereupon the court instructed the jury that the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the issues submitted to the jury by the pleadings, and that they should return a verdict for the plaintiffs and against both the defendants.

To the giving of this instruction the defendant Lybrand then and there duly excepted. (Record, p. 32.)

The jury thereupon returned a verdict for the plaintiffs, and against both the defendants.

The defendant Lybrand moved for a new trial, which was overruled and judgment entered against him; thereupon he sued out this writ of error to reverse said judgment.

The record shows that the issues raised by the plea of *nul tiel record* was not decided or disposed of in any way

by the court, but that judgment was rendered the same as though there was no such issue in the case.

On the 28th day of February, 1873, (Record, p. 15) and more than a month before the pleadings in the cause were settled, the defendant Lybrand asked the court for leave to file the two additional pleas which were as follows, viz:

First additional plea offered by Lybrand:

"And and the said defendant Lybrand, for a further plea in this behalf says *actio non*, because he says that at the time of the commencement of said suit in said Supreme Court of New York, in which said judgment is alleged to have been rendered, the said defendant was, and ever since hath been, a resident inhabitant and citizen of the State of Illinois, and that said defendant was not at the time of the commencement of said suit, nor at the time of the rendition of the said supposed judgment, in the said State of New York.

And the said defendant Lybrand further avers that he never was served with any process, summons, citation, or notice of any kind to appear in the court, in which said judgment is alleged to have been rendered; and the said defendant avers that he never authorized any attorney, or any other person, to appear for him in said cause in said Supreme Court of New York, and that said defendant never entered his appearance in said cause in person; and said defendant further avers that at the time of the commencement of said suit in the Supreme Court of New York, and ever since then, there has been a public statute in force in said State of New York, providing that in actions brought against two or more defendants, jointly indebted upon contract, where the summons is served on one of them only, then, if the plaintiff in such action recover judgment, it may be entered against all of such defendants though they were not all served with summons.

And the defendant further avers, that in a suit upon such judgment in the courts of the said State of New York, either against the defendant alone, who was not originally summoned to answer the complaint, or in a suit against him with the defendant, who was originally summoned, such defendant, by the law and usage of the courts of the said State of New York, could make any defense thereto which he might have made to the action if the summons had been served on him originally, and such defense had been interposed in such first action.

And the said defendant Lybrand further avers, that the action in which said judgment set out in plaintiff's declaration was rendered, was an action against two defendants, jointly indebted upon contract, and that summons in said action was served on said defendant, Hall, and not on said defendant Lybrand.

And the defendant Lybrand, further avers, that by the law and usage of the courts of the said State of New York, he might have interposed as a defense to said action, upon which the judgment mentioned in plaintiff's declaration was rendered, if he had been served with summons therein originally, that said defendants Hall & Lybrand, (the defendants hereto,) had a counter claim, demand, or set-off against the plaintiffs in said suit, and in case such counter claim, demand, or set-off, so interposed by him as aforesaid, had exceeded the claim or demand of the plaintiffs in such suit, then judgment would have been rendered against such plaintiffs for such excess.

And the said defendant Lybrand, further avers that at the time of the commencement of said suit upon which the judgment set out in the plaintiffs' declaration was rendered, the said defendants, Hall & Lybrand, had, and ever since then have had, a counter claim, demand, and set-off against the said plaintiffs, to an amount greatly, to wit: four thousand dollars, in excess of all the claims and demands of the said plaintiffs against said defendant Lybrand.

And the said defendant further avers that at the time of the commencement of this suit, to wit, at the said Northern District of Illinois, the said plaintiffs were, and from thence hitherto have been and still are, indebted to the said defendant, Lybrand, to a large amount, to wit, in the sum of eight thousand dollars, for divers goods, wares, hops, and merchandise sold and delivered by the said defendants, Hall & Lybrand, at the request of said plaintiffs, and for money by the said defendants, Hall & Lybrand, before that time lent and advanced to and paid, laid out and expended for the said plaintiffs, at their like request, and for money by the said plaintiffs before that time had and received, to and for the use of the said defendants, and for money due and owing from the said plaintiffs to the said defendant, Lybrand, and by the said defendant Lybrand forborne to the said plaintiffs for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiffs to the said defendant Lybrand, upon an account stated between them, which said sums of money so due and owing from the said plaintiffs to the said defendant Lybrand, exceed the supposed debt due and owing from the said defendants to the said plaintiffs, and the damages sustained by the said plaintiffs by reason of the detention of the supposed debts so alleged to be due and owing to the said plaintiffs, as in the said declaration mentioned.

And the defendant Lybrand avers that said sums of money due as hereinbefore stated, from said plaintiffs, are greatly, to wit, four thousand dollars, in excess of any and all claims, demands, debts or causes of action which the said plaintiffs had at the time of the commencement of this suit, or now have against said defendant Lybrand.

And said defendant Lybrand is ready and willing, and hereby offers to set off and allow to the said plaintiffs, out of said sums of money so due and owing to him as herein

stated, the full amount of the said supposed debts and damages in the said declaration mentioned, and the full amount of any and all of the plaintiff's claims, demands, or causes of action against the said defendant Lybrand.

And said defendant prays that he may have judgment against the said plaintiffs for the excess, to wit, four thousand dollars due him from said plaintiffs as aforesaid, over and above any and all debts, damages, claims, demands, or causes of action said plaintiffs have against him. And this the said defendant Lybrand is ready to verify," etc. (Record, pp. 17, 18 and 19.)

Second additional plea offered by Lybrand:

" And said defendant, Lybrand, for a further plea in this behalf, says *actio non*, because he says that at the time of the commencement of said suit in said Supreme Court, of New York, in which said judgment is alleged to have been rendered, the said defendant Lybrand, was, and ever since has been, a resident, inhabitant, and citizen of the State of Illinois; and that said defendant, Lybrand, was not at the time of the commencement of said suit, nor at the time of the rendition of said supposed judgment, in the said State of New York.

And the said defendant avers that he never was served with any process, summons, citation, or notice of any kind to appear in said court in which said judgment is alleged to have been rendered. And said defendant avers that he never authorized any attorney or any other person to appear for him in said cause in said Supreme Court of New York, and that said defendant, Lybrand, never entered his appearance in person in said cause.

And the said defendant, Lybrand, further avers, that at the time of the commencement of said suit in the Supreme Court of New York, there was, and from thence hitherto there hath been, a public statute in force in the said State of New York, providing that in actions brought

And the said defendant further avers that at the time of the commencement of this suit, to wit, at the said Northern District of Illinois, the said plaintiffs were, and from thence hitherto have been and still are, indebted to the said defendant, Lybrand, to a large amount, to wit, in the sum of eight thousand dollars, for divers goods, wares, hops, and merchandise sold and delivered by the said defendants, Hall & Lybrand, at the request of said plaintiffs, and for money by the said defendants, Hall & Lybrand, before that time lent and advanced to and paid, laid out and expended for the said plaintiffs, at their like request, and for money by the said plaintiffs before that time had and received, to and for the use of the said defendants, and for money due and owing from the said plaintiffs to the said defendant, Lybrand, and by the said defendant Lybrand forborne to the said plaintiffs for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiffs to the said defendant Lybrand, upon an account stated between them, which said sums of money so due and owing from the said plaintiffs to the said defendant Lybrand, exceed the supposed debt due and owing from the said defendants to the said plaintiffs, and the damages sustained by the said plaintiffs by reason of the detention of the supposed debts so alleged to be due and owing to the said plaintiffs, as in the said declaration mentioned.

And the defendant Lybrand avers that said sums of money due as hereinbefore stated, from said plaintiffs, are greatly, to wit, four thousand dollars, in excess of any and all claims, demands, debts or causes of action which the said plaintiffs had at the time of the commencement of this suit, or now have against said defendant Lybrand.

And said defendant Lybrand is ready and willing, and hereby offers to set off and allow to the said plaintiffs, out of said sums of money so due and owing to him as herein

stated, the full amount of the said supposed debts and damages in the said declaration mentioned, and the full amount of any and all of the plaintiff's claims, demands, or causes of action against the said defendant Lybrand.

And said defendant prays that he may have judgment against the said plaintiffs for the excess, to wit, four thousand dollars due him from said plaintiffs as aforesaid, over and above any and all debts, damages, claims, demands, or causes of action said plaintiffs have against him. And this the said defendant Lybrand is ready to verify," etc. (Record, pp. 17, 18 and 19.)

Second additional plea offered by Lybrand:

" And said defendant, Lybrand, for a further plea in this behalf, says *actio non*, because he says that at the time of the commencement of said suit in said Supreme Court, of New York, in which said judgment is alleged to have been rendered, the said defendant Lybrand, was, and ever since has been, a resident, inhabitant, and citizen of the State of Illinois; and that said defendant, Lybrand, was not at the time of the commencement of said suit, nor at the time of the rendition of said supposed judgment, in the said State of New York.

And the said defendant avers that he never was served with any process, summons, citation, or notice of any kind to appear in said court in which said judgment is alleged to have been rendered. And said defendant avers that he never authorized any attorney or any other person to appear for him in said cause in said Supreme Court of New York, and that said defendant, Lybrand, never entered his appearance in person in said cause.

And the said defendant, Lybrand, further avers, that at the time of the commencement of said suit in the Supreme Court of New York, there was, and from thence hitherto there hath been, a public statute in force in the said State of New York, providing that in actions brought

against two or more defendants jointly indebted upon contracts, where the summons is served upon one of them only, then, if the plaintiff in such action recover judgment, it may be entered against all of such defendants, though they were not all served with summons.

And the defendant, Lybrand, further avers, that in a suit upon such judgment in the courts of the said State of New York, either against the defendant above, who was not originally summoned as aforesaid, or in a suit against him, together with defendant who was originally served with summons as aforesaid, such defendant, by the law and usage of the said courts of the said State of New York, could make any defense thereto which he might have made to the action if the summons had been served on him originally, and such defense had been interposed in such first action.

And the defendant Lybrand further avers, that the action in which said judgment set out in the plaintiff's declaration was rendered, was an action against two defendants jointly indebted upon contract, and that summons in said action was served on said defendant Hall, and not on said defendant Lybrand.

And the said defendant Lybrand avers further that by the law and usage of the courts of the said State of New York, he might have interposed as a defense thereto that he was not indebted to the plaintiffs therein, and that he had not undertaken and promised to pay them as claimed by them in said suit.

And he further avers that he is not now, nor was he at the time of the commencement of this suit, nor was he at the time said suit was commenced in the said Supreme Court of said State of New York, in which said judgment was rendered, indebted to said plaintiffs in any sum whatever, nor has he ever undertaken or promised to pay them any sum whatever, and this he, the said Lybrand is

ready to verify; wherefore he prays judgment," etc. (Record, pp. 19 and 20.)

The court refused to allow these pleas to be filed, on the ground that they did not set up a good defense, because the record was conclusive and could not be opened. To which ruling the defendant Lybrand excepted.

ASSIGNMENT OF ERRORS RELIED UPON.

I.

The court erred in refusing to allow the defendant Lybrand leave to file the two special pleas, or either of them, which he asked leave to file before the pleadings were settled.

II.

The court erred in rendering judgment before disposing of the issue raised by the plea of Lybrand of *nul tiel record*.

III.

The court erred in rendering judgment upon the verdict of the jury, because:

First, all the issues of fact raised by the pleadings were not disposed of.

Second, it does not appear which issue was decided by the jury.

And third, the issue raised by Lybrand's plea of *nul tiel record* should not have been submitted to the jury, but should have been decided by the court.

IV.

The court erred in rejecting all and every part of the following evidence offered by said Lybrand, to wit: "Evidence to prove that the defendant Lybrand never was a resident or citizen of the State of New York; and that he had not been within said State of New York at any time since, nor for a long time before the commencement of the suit in which the judgment was rendered, upon which the plaintiff in this case brought suit; and that he never had any summons, process, notice, citation, or notice of any kind, either actual or constructive, ever given or served upon him; and that he never authorized any attorney or any other person to appear for him; and that no one ever had any authority to appear for him in said suit in the State of New York, or to enter his appearance therein, nor did he ever authorize any one to employ an attorney to appear for him in the action in which said judgment was entered; and that he never entered his appearance therein in person; and that he knew nothing of the pendency of said suit in the said State of New York until the commencement of the present suit in this court; that said Lybrand was a partner in business with said J. Sherman Hall, at the time the transactions occurred upon which the plaintiffs brought suit in New York, though said partnership had been dissolved and due notice thereof published some six months prior to the commencement of said suit in New York."

V.

The court erred in instructing the jury as follows, viz: "That the record introduced in evidence by the plaintiffs was conclusive evidence for the plaintiffs to maintain the issues submitted to the jury by the pleadings, and that they should return a verdict for the plaintiffs and against both defendants."

BRIEF.

The *general rule* of law in New York is, that "want of jurisdiction may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed from it—the want of jurisdiction either of the subject matter, or of the person of either party, renders the judgment a mere nullity" there.

Kerr *v.* Kerr, 41 New York (2 Hand,) on p. 275, per James, J.

Shumway *v.* Stillman, 6 Wendell, 447.

Borden *v.* Fitch, 15 Johnson, 121.

Dobson *v.* Pearce, 12 N. Y., on p. 164, per Allen, J.

Kinnier *v.* Kinnier, 45 N. Y., on p. 542, per Church, Ch. J.

And for the purpose of showing that the court did not have jurisdiction, the recitals in the judgment record may be contradicted.

Adams *v.* Saratoga and Vermont R. W. Co., 10 New York, (6 Selden), on p. 332 and 333, per Gridley, J.

Harrington *v.* People, 6 Barb., on pp. 607 and 610, per Paige, J., and other cases in N. Y. there cited.

Latham *v.* Edgerton, 9 Cowen, 228, and cases there cited.

But there is this exception to the general rule above stated in New York. Where an attorney has appeared without authority for a party, he cannot be allowed to dispute the authority of the attorney when the judgment is brought in question—except by a *direct proceeding* in the court where the judgment remains—and he cannot always do that if the attorney is responsible, as a suit

against the attorney is, under some circumstances, held an adequate remedy for him.

The *reason* of the exception to the general rule, is because the title to real estate depends to a great extent upon the records of the courts, and the injured party has an ample remedy against the attorney, if responsible, or can apply to the court in which judgment was rendered for relief.

Brown *v.* Nichols, 42 New York, 26, per Ingall, J., on p. 32, and per Earle, J., on p. 30.

Denton *v.* Noyes, 6 Johnson, 296.

The reasons of the exception to the general rule in force in New York, do not apply to a suit upon such judgment record in another State, because

First.—The title to real estate cannot be affected by impeaching a judgment record in a State where it never has yet become a judgment.

Second.—There is no remedy in *any* of the courts of the State where suit is brought upon the judgment record, either by direct application to the court in which the judgment was rendered, or by suit against the attorney who appeared without authority.

The fact that a party has got to go to a distant forum outside the limits of his own State for redress, has frequently been held no adequate or sufficient remedy, and almost equivalent to no remedy at all.

Buckmaster *v.* Grundy, 3 Gilman (Ill.), 626, 630-1.

Tribbles *v.* Toul, 7 Monroe, 455.

Green *v.* Campbell, 2 Jones (Eq.) N. C, 448.

Richardson *v.* Williams, 3 *id.*, 119.

Smith *v.* Field, 6 Dana (Ky.) 364.

Taylor *v.* Stowell, 4 Met. (Ky.) 176-7.

Pander *v.* Cox, 28 Geo. 306-7.

Key *v.* Robinson, 29 *id.*, 34.

Lirch *v.* Foster, 1 Vesey, Sr., 88.
Edminson *v.* Baxter, 4 Haywood (Tenn.) 112.
Graham *v.* Tarkersby, 15 Ala., N. S., on p. 644.
Hinrichson *v.* Reinbach, 27 Ills., on p. 301.

The evidence offered by Lybrand to show that the attorney who appeared for him did so without authority, does not contradict the record, but simply explains it. And Lybrand was not estopped from showing it.

Shelton *v.* Tiffin. 6 Howard (U. S.) on p. 186.
Gleason *v.* Dodd, 4 Metc. (Mass.) on p. 338.
Barden *v.* Fitch, 15 Johnson R. 121.
White *v.* Jones, 38 Ills. R., on p. 163.
Welch *v.* Sykes, 3 Gilman (Ills.) on p. 200.
Hall *v.* Williams, 6 Pick. (Mass.) 232, on p. 247.
Shumway *v.* Stillman, 6 Wendell, 447.
Aldrich *v.* Kinney, 4 Conn., 380, and cases cited therein.
Haskin *v.* Blackmer, 20 Iowa, 162, and cases cited therein.
Kerr *v.* Kerr, 2 Hand. (N. Y.) 272.
Wilson *v.* Bank of Mt. Pleasant, 6 Leigh (Va.) 570.
Price *v.* Ward, 1 Dutcher (N. J.) 229.
Bigelow on Estoppel, p. 226.
6 Robinson's Practice, 438.
2 American Leading Cases (5th Ed.) 638, 642 and cases cited.
Freeman on Judgments, § 563 (2nd Ed., p. 559).

The recitals in the record of a judgment of a sister State, when sought to be enforced in another State, can be contradicted as to any jurisdictional fact, notwithstanding such recitals could not be contradicted in the State where the judgment was rendered, and notwithstanding the constitutional provision "that full faith and credit shall be given in each State to the public acts, records,

and judicial proceedings of every other State," and the act of Congress passed to carry it into effect.

Thompson *v.* Whitman, 18 Wallace, 457, and cases cited in the opinion of the court.

Knowles *v.* Gas Light and Coke Co., 19 Wallace, 59.

Starbuck *v.* Murray, 5 Wendell R., 148, on p. 159, per Marcy, J.

Rope *v.* Heaton, 9 Wisconsin, 328, on p. 332 to 337.

Kerr *v.* Kerr, 41 New York R., 272.

Shumway *v.* Stillman, 6 Wendell, on p. 453.

Noyes *v.* Butler, 6 Barb., 613.

Norwood *v.* Cobb, 24 Texas, 551.

Carleton *v.* Bickford, 13 Gray (Mass.), 591.

"If a party has opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel and commits the matter to the jury who are to find the truth."

Phil. W. and B. R. R. Co. *v.* Howard, 13 Howard (U. S.) on p. 335, *dicta* by Curtis, J., and cases cited by him.

7 Robinson's Practice, 923, 924 and 925, and cases cited.

Saunders on Pleading and Evidence (5th Am. Ed.) 63, and cases cited.

Stephen on Pleading, 220, and in note (2 *b*).

1 Chitty on Pleading (14 Am. Ed.) 509, and cases cited in note *c*, p. 478.

Hanson *v.* Buckner's Ex., etc., 4 Dana, 255.

Magrath *v.* Hardy, 4 Bingh., N. C., 782, (33 Eng. C. L.)

Carpenter *v.* Buller, 8 M. and W., 212.

Clarke *v.* Mix, 15 Conn., 182.

Young *v.* Raincock, 7 Man. Gr. and S. 338, (62 E. C. L.)

Litchfield *v.* Ready, 5 W. H. and G. (Exchr.) 945 (*dicta*).

Matthew *v.* Osborne, 13 Com. B. (4 J. Scott) 944, (76 E. C. L.) (*dicta*).

Eversham *v.* Emerson, 11 Exchr. (H. & G.) 391.

Carroll Co. *v.* Collier, 22 Gratt., (Va.) 309.

Cleaton *v.* Chambliss, 6 Rand., 86 (*dicta*).

Howard *v.* Mitchell, 14 Mass., 242.

Bartholomew *v.* Candee, 14 Pick., 167.

Long *v.* Long, 5 Watts, 103 (*dicta*)

Smith *v.* Elliott, 9 Barr, 345.

Picquet *v.* McKay, 2 Blackf., 465.

Readmond *v.* Coffin, 2 Dev. Eq., 445.

Wood *v.* Jackson, 8 Wend., 10, on p. 35 (*dicta*).

Wright *v.* Butler, 6 Wendell, 284 (*dicta* on p. 288-9.)

Doe *v.* Huddart, 2 Cv. M. & R. 322.

Outram *v.* Morewood, 3 East., 346.

Voogt *v.* Winch, 2 Barn. & Ald., 662.

Church *v.* Leavenworth, 4 Day, 274.

Trevivan *v.* Lawrence, 2 Ld. Raym., 1051.

Miller *v.* Maurice, 6 Hill, 115, *dicta* on p. 125.

Where there is a plea of *null tiel record* in a case, the issue upon it must be tried by the court, and the finding of the court upon that issue should appear.

Gray *v.* Pingray, 17 Vt., 419, on p. 422.

Brady *v.* Commonwealth, 1 Bibb., 517.

Williams' Notes to 1 Saunders' R., p. 92.

2 Harris' Modern Entries, pp. 362 and 367.

It was error in the court to refuse the motion of Lybrand for leave to file his two additional pleas.

Sec. 5 of the U. S. Practice Act of June 1, 1872, (17 Statutes at Large, p. 197).

Vol. 2, Gross Statutes of Ill., (1872) page 286-7, Ch. 83, sec. 111, and page 290, ch. 83, sec 149.

ARGUMENT.

The principal question involved in this case is whether the court erred in refusing to allow Mr. Lybrand, the defendant, in the court below, to introduce evidence to show the judgment obtained in New York was void for want of jurisdiction.

It is claimed that in the State of New York Mr. Lybrand could not attack this judgment in a collateral proceeding, by showing that the attorney who appeared for him did so without authority, and that therefore under the provisions of the U. S. Constitution (1) and the act of Congress (2) passed to carry the same into effect, he cannot do so in any court in the United States.

To this we reply:

FIRST. If the same faith and credit be given to this judgment which it has by law or usage in the courts of New York, then the evidence should have been admitted.

In order to ascertain what faith and credit is given to this judgment record in the State of New York, we must look into the decisions of the courts of New York; and it is a well-settled principle that the courts of the United States will take judicial notice of the laws and decisions of the several States (3).

(1) Art. IV. Sec. 1. "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

(2) "The said records and proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or may be taken." Act of Congress of May 26th, 1790. 1 Stat. at Large, 122.

(3) Cheever *v.* Wilson, 9 Wallace, on p. 121; Owings *v.* Hull, 9 Peters, 607; Pennington *v.* Gibson, 16 Howard, (U. S.) on p. 81.

It is the general rule in New York, settled by reported decisions (1), that "want of jurisdiction may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed under it,—and the want of jurisdiction, either of the subject matter or of the person of either party, renders a judgment a mere nullity." And it has been repeatedly held (2) that for the purpose of showing that the court did not have jurisdiction the recitals in the judgment record may be *contradicted.*

So that it would seem necessarily to follow that a judgment record may be *contradicted* as to its recitals of any jurisdictional fact in any court of the United States, if no greater "faith and credit" is to be given to it, than it possesses in N. Y.

But to this general rule in N. Y. there is an exception founded upon reasons which we shall show, do not apply to the present case.

The *exception* is this: where an attorney has appeared for a party in N. Y. without authority, such party is not allowed to show this fact when the judgment so obtained against him is brought (3) in question in any collateral proceeding in the courts in N. Y.; nor is he allowed in all cases where the attorney so appearing for him without authority is responsible, to attack the judgment in a *direct proceeding* in the court in which the judgment is rendered (4).

(1) Kerr *v.* Kerr. 41 N. Y., on p. 275; Shumway *v.* Stillman, 6 Wendell, 447; Barden *v.* Fitch., 15 John., 121; Dobson *v.* Pearce. 12 N. Y., per Allen J., on p. 164; Latham *v* Edgerton, 9 Cowen, 228; Harrington *v.* People, 6 Barb., on p. 607; Adams *v.* Saratoga & Vt. R. W. Co., 10 N. Y., on p. 332 and 333.

(2) Adams v. Saratoga & Vt. R. W. Co., 10 New York, (6 Sheldon) on pp. 332 and 333, per Gridley, J.; Latham v. Edgerton, 9 Cowen, 228 and cases cited; Harrington v. People, 6 Barb., on p. 607 and 610, per Page J., and cases cited by him.

(3) Brown *v.* Nichols, 42 N. Y., 26, on pp. 30, 32 and 33. Taylor *v.* Trask, 7 Cowen, on p. 251 (*dicta*).

(4) Hamilton *v.* Wright. 37 N. Y., 502, on p. 504; Am. Ins. Co. *v.* Oakley, 9 Paige Ch.. 496; Dunton *v.* Noyes, 6 John., 296, on p. 300. *dicta* by Kent, Ch. J.

By statute law in N. Y. (1) warrants of attorney are abolished, and it is not necessary for any attorney to exhibit or file any evidence of his authority, to act for a suitor (2).

And if the attorney is responsible, the court will not, even before judgment, permit the question of his authority to be raised, leaving the injured party entirely to his remedy against the attorney (3).

Hence it is manifest that in N. Y. a judgment *obtained in that State*, against a party who was never notified of the suit, and never entered his appearance, and never authorized any one to appear for him and knew nothing of the suit whatever, is just as binding on him as though he was duly served with process, provided an attorney has assumed to act for him.

It is a well-established maxim that "reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself" (4). We shall, therefore, undertake to show that the *reason* of this rule of law in force in New York ceases when a judgment of that kind is sued upon in another State.

The *reason* for this rule of law is very clearly laid down in Brown *v.* Nichols (5). Mr. Justice Ingall in that case, in speaking of the rule, says (6): "A contrary rule would, it seems to me, be impracticable, as the title to real property depends to a great extent upon the records of the courts; it would be a great hardship to compel parties in tracing titles acquired through such records, in every instance where a judgment has been entered, to inquire into the particular authority which an attor-

(1) 2 Stat. at Large, N. Y., p. 362, s. 26.
(2) Jackson *v.* Smith, 6 John., 34; Acker *v.* Ledyard, 8 N. Y., 62, on p. 65.
(3) Hamilton *v.* Wright, 37 N. Y., 502, on p. 504; Jackson *v.* Smith, 6 John., 34; Acker *v.* Ledyard, 8 N. Y., 62, on p. 65, and cases there cited.
(4) Broom Leg. Maxims, top p. 123; *p. 160.
(5) 42 N. Y. 26, on pp. 30, 32 and 33.
(6) Page 32.

ney had to appear in such actions. Indeed, the effect of the rule would be to create positive distrust as to the soundness and regularity of such titles." * * * "I think the objections on the grounds of hardship and danger, urged against upholding such appearance by attorney, rest more in theory than in practice. If the party will omit to apply to the court for relief against an unauthorized appearance of an attorney, he should not be allowed to attack proceedings collaterally upon such ground."

Mr. Justice Earle in the same case says (1): "I think it ought to be regarded as the settled law of this State that the judgment may stand, and the party must seek his remedy against the attorney who without any authority has appeared for him, *unless there is some good reason for not doing it.* I think a party should *always* seek relief for an unauthorized appearance in the suit in which it has been put in, where the rights and equities of all parties can be best protected. This rule is based not entirely upon the law of agency, *but upon reasons of policy and justice.*"

From this it will be seen that the rule is based in New York on two grounds. *First,* A contrary rule would render the title to real estate uncertain.

And, *second,* The injured party has an ample remedy by suing the attorney who appeared for him without authority, if he is responsible; and if he is not responsible, then by a direct application to the court in which the judgment is rendered, to have it set aside.

Neither of these grounds exist when suit is brought upon such a judgment in another State.

The judgment has never yet been entered of record in any other State, and consequently the title to any real estate cannot be affected by defeating a recovery upon it. This disposes of the first and the principal reason for the rule.

(1) Page 30.

As to the other ground, we say we have no way either of suing the attorney in *the State of Illinois*, where an action is brought upon the judgment, because the attorney is a resident of N. Y., nor of making a direct application to any court in *the State of Illinois* to set aside the judgment.

If suit had been brought upon this judgment in N. Y., we would have had a remedy *in that State* in one of the above ways.

It may be said that we can go to N. Y. and obtain redress by suit against the attorney, or by getting the judgment set aside. But the fact that a party has to go to a distant forum, outside the limits of his own State, for redress, has frequently been held no adequate or sufficient remedy and almost equivalent to no remedy at all (1).

It must, therefore, be admitted that the *reasons* for the exceptions to the general rule in force in N. Y. cease, when suit it brought upon such a judgment in another State, and we therefore insist that the exception to the rule ceases also.

But we are not left to rely upon argument alone, to support our position, that the exception to the general rule in force in N. Y., does not apply when action is brought upon the judgment in a different State from that in which the judgment was rendered.

The question has been expressly decided in the N. Y. courts.

And it has been there held (2) where a judgment is sought to be enforced in another State from that in which the judgment was rendered, the authority of the attorney

(1) Buckmaster *v.* Grundy, 3 Gilman, 626, 630-1: Tribbles *v.* Toul, 7 Monroe, 455; Green *v.* Campbell, 2 Jones' Eq. N. C., 448; Richardson *v.* Williams, 3 *id.*, 119; Smith *v* Field, 6 Dana, (Ky.) 364; Taylor *v.* Stowell, 4 Met., (Ky.) 176-7; Ponder v. Cox, 28 Geo., 306-7; Key v. Robinson, 29 *id.*, 34; Lirch v. Foster, 1 Ves. Sr., 88; Edminson v. Baxter, 4 Haywood, (Tenn,) 42; Graham v. Tankersley, 15 Ala. N. S., on p. 644; Heinrickson v. Reinback, 27 Ills,. *dieta* on p. 301.

(2) Kerr v. Kerr, 41 N. Y. (2 Hand) 272, on pp. 274, 275 and 276. Shumway v. Stillman, 6 Wendell, 447, on p. 453. Brown v. Nichols, 42 N. Y. 26, *per* Grover, J., on pp. 39 and 40.

who appeared for the defendant can be disputed, and if it is shown that the attorney appeared without authority, that renders the judgment a nullity.

In Shumway *v.* Stillman (1), Chief Justice Savage said, in speaking on this subject: "The judgment of a court of general jurisdiction, in any State in the Union, is equally conclusive upon the parties in all the other States, as in the State in which it was rendered. This, however, is subject to two qualifications: 1. If it appear by the record that the defendant was not served with process and did not appear in person or by attorney, such judgment is void; and 2. If it appear by the record that the defendant appeared by attorney *the defendant may disprove the authority of such attorney to appear for him.*"

In the case of Kerr *v.* Kerr, the defendant introduced the record of a judgment of divorce obtained in Indiana, from which record it appeared that a firm of attorneys appeared and filed an answer for the defendant in the divorce suit. In reply to this the other side claimed the decree of divorce was a nullity because the attorneys had no authority to appear for the defendant therein, and introduced evidence to show the want of authority.

The Court of Appeals, per James, J., say, in speaking of this matter (2):

"The proof taken showed affirmatively that no process in said action, or notice of the same, had ever been served on her; that she had no knowledge of said action, and never, either directly or indirectly, authorized said attorneys, or any other attorney, or persons, to appear or answer for her in said action or proceeding. That being so, the court had no jurisdiction of the person of the defendant, nor authority to proceed and grant a judgment against her.

It was insisted that a foreign judgment could not be

(1) 6 Wend., on page 453.
(2) Page 275-6.

inquired into collaterally, or impeached by parol evidence. But the judgment of a court of a sister State has no binding effect in this State, unless the court had jurisdiction of the subject matter, and of the persons of the parties. Want of jurisdiction is a matter which may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed for it; the want of jurisdiction, either of the subject matter or of the person of either party, renders a judgment a mere nullity. (Berdan *v.* Fitch, 15 J. R., 121; Andrews *v.* Montgomery, 19 J. R., 162; Shumway *v.* Stillman, 3 Cow., 372; Shelton *v.* Perry, 6 How., 163, 186.) It was said in Hoyes *v.* Butler, (6 Barb., 613): "The Constitution of the United States, which declares that full faith and credit shall be given in each State to the judicial proceedings of every other State, and the acts of Congress, which declare that the judgment of the State courts shall have the same faith and credit in other States as they have in the State where they are rendered, do not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered; nor an inquiry into the rights of the State to exercise authority over the parties, or the subjeet matter; nor an inquiry whether the judgment is founded on. or impeachable for, fraud; and that such a judgment may be inquired into, although the record states facts, giving the court jurisdiction. Such record is never conclusive as to recitals, or statements of jurisdiction." (5 Wend., 158; 6 Wend, 454.) Therefore, such proof being admissible, and the evidence given in this case having clearly shown a want of jurisdiction in the court to entertain the proceeding, and render judgment, the judgment record produced on the hearing was properly held as not establishing a divorce of the intestate from the respondent herein."

Now, the act of Congress only requires that "such faith and credit" be given to this record as it has in New York.

We have shown, we think, very conclusively, that by the law and usage of the courts of New York, this record could be impeached *in the manner and under the circumstances*, which we sought to impeach it here, yet we were not permitted to do it.

In our opinion the learned Judge, before whom this case was tried in the court below, in his zeal to uphold the Constitution of the United States, and obey the act of Congress, has erred in the other direction, and has given more faith and credit to this record than it would have received under like circumstances in the courts of the State of New York.

The evidence offered by Lybrand to show that the attorney who appeared for him did so without authority, does not contradict the record, but simply explains it.

This court expressly decided in case of D'Arcy *v.* Ketchum (1), that where a judgment is sought to be enforced outside of the State where it was rendered, if it is made to appear, *without contradicting the record*, that the court did not have jurisdiction of the defendant. then no faith and credit whatever will be given to it, but such judgment is *void*, even though in the State where the judgment was rendered it was valid, and therefore, of course, had some "faith and credit" given to it.

Now we contend that the evidence offered and rejected was proper within the principles of that case. It did not contradict the judgment record, but simply explained its recitals.

The recital in question in the judgment is as follows: "A court of record, and having jurisdiction of the subject matter of this action and of the defendants, *said defendants having appeared in said court by their attorney.*"

(1) 11 Howard, 165.

In New York, as we have hereinbefore shown, an attorney does not have to present to the court any evidence of his authority to act for a party, before he is permitted to enter an appearance for him, and consequently the court is not called upon to pass upon the question of whether or not the attorney who does appear for a defendant has done so by authority.

And it is even the law in that State, as we have shown, that "if an attorney has acted without authority, the defendant has his remedy against him, but the judgment is still regular, and the appearance entered by the attorney *without authority is a good appearance as to the court* (1).

Now if an appearance by an attorney in New York is a "good appearance" as to the court, then are we not simply *explaining*, not *contradicting*, the recital in the judgment record, which says, "the court having jurisdiction of the person of the defendants, they having appeared by their attorney," when we offer to show that as a matter of fact the attorney who appeared did so without our authority?

Though we do prove this, still the recital that the attorney appeared for us, and that the court had jurisdiction, (so far as the courts of New York are concerned) is not disputed, traversed or contradicted.

The court would have had jurisdiction if the attorney had appeared *with* authority or *without* authority; it made no difference so far as the truthfulness of that allegation in the judgment is concerned. And yet we claim that we have a right to *explain* what is by the record left in doubt—*i. e.* that the attorney, *though ours, so far as giving the court in New York jurisdiction*, is concerned, yet he was not authorized.

It is no more of a contradiction of the recitals of the record than it would be for us to explain in a case where

(1) Per Kent J., in Denton v. Noyes, 6 John., on p. 300. See also cases cited *ante*.

we might have occasion to do it, whether the attorney who appeared for us in the suit was authorized to do so by *parol* or by *deed.*

Suppose the defendant Lybrand had not been served with process at all, and no appearances entered for him, yet under the Joint Debtor Act of N. Y., the claim being one against partners, judgment might have been rendered against him with equal propriety as in a case where an attorney enters his appearance without authority. And the record could have truthfully recited that the court *had jurisdiction of him, he having been legally brought into court.* In such a case could it be contended for a moment, that under the decisions of this court, in D'Arcy *v.* Ketchum, we would not have the right to *explain* the recitals in the record by showing the *way* the New York court, under its laws, brought us into court and acquired jurisdiction over us?

In Gleason *v.* Dodd (1), Shaw, C. J., says:

"A record merely reciting one's having appeared by attorney, was held not to be contradicted, by a plea alleging that he never was within the jurisdiction of the court, was never served with process, and never did appear. 6 Pick., 246."

"It therefore follows, that the conclusions of judgments as to matters tending to show that the court had jurisdiction, does not extend to such recitals, but only *to specific averments of fact*, such as an arrest, personal service, or personal appearance. But such general recital, if evidence at all is *prima facie* only, may be traversed, and the contrary shown by proof."

In Shelton *v.* Tiffin (2), McLean, J., says, in a case where it was attempted to be shown that a judgment was void *in the same State* where rendered, because the attorney had no authority to appear. "The evidence does not

(1) 4 Metcf. (Mass.), on p. 338.
(2) 6 Howard, on p. 186.

contradict the record, but explains it. The appearance was the act of the counsel and not the act of the court. Had the entry been that L. P. Perry came personally into court and waived process, it could not have been contradicted. But the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

In Borden *v.* Fitch (1), the question arose whether a decree of divorce obtained in Vt., which recited *in the decree*, "and it being shown to the court that the said Charlotte has been *duly notified* to appear before this court," etc., etc., was a nullity.

The court permitted evidence to be introduced to show that the defendant was a non-resident, and was never served and never appeared, and that the laws of Vt. relative to divorces required only a publication in the newspapers as to non-resident defendants, and held the decree a nullity for want of jurisdiction.

In White *v.* Jones (2) Walker, J., says: "As a rule of general if not uniform application, a judgment is void for all purposes, unless the court had jurisdiction of the person of the deft. and of the subject matter of the suit; and jurisdiction is acquired by the actual service of process, notifying the party to appear by constructive notice to appear, as by publication, or by an entry of his appearance by himself in person or by attorney.

(1) 15 John, 21.
(2) 38 Ill., on p. 163.

In the last case the authority of the attorney to enter his appearance may be contested by the defendant, and if he shows a want of authority it defeats the jurisdiction of the court."

Mr. Freeman, in his excellent work on Judgments (1) says, in speaking on this subject: "The general recital that the defendant appeared, is even in those States where direct jurisdictional statements are regarded as conclusive, susceptible of explanation and avoidance by showing that the appearance was by an unauthorized attorney. It is also thought to involve no dispute with the record to show that the attorney whom it states appeared, had no authority to do so. In those instances, however, and others of a like kind, the courts have relied on the well-known rule that estoppels must be certain, as a reason for admitting evidence that might have been shut out by a clear and positive recital. There was said to be no direct or necessary conflict between an averment on the one part, that the defendant appeared, and proof on the other that the appearance was by an attorney who did not represent the defendant."

For further authorities upon this point, see Welch *v.* Sykes (2), Hall *v.* Williams (3), Shumway *v.* Stillman (4), Aldrich *v.* Kinney (5), Haskin *v.* Blackmer (6), Kerr *v.* Kerr (7), Wilson *v.* Bank of Mt. Pleasant (8), Price *v.* Ward (9), and cases cited in 6 Robinson's Prac., 438; Bigelow on Estoppel p. 229, 2 American Leading cases, (5th Ed.) 633 and 642.

(1) 2d Edition, page 559, 563.
(2) 3 Gill., on p. 200.
(3) 6 Pick. 232, on p. 247.
(4) 6 Wend., 447.
(5) 4 Conn., 380, and cases cited.
(6) 20 Iowa, 162, and cases cited.
(7) 2 Hand, (N. Y.) 272.
(8) 6 Leigh (Va.) 570.
(9) 1 Dutcher, N. J., 229.

The record of a judgment of a sister State, when sought to be enforced in another State, can be impeached by showing that the defendant was not a citizen of the State in which the judgment was rendered, and that the court had no jurisdiction over him, even though by so doing the recitals in the record are contradicted, and even though such recitals could not be contradicted by law or usage in the courts of the State where the judgment was rendered.

Supposing we are wrong about the faith and credit which, by law or usage, in the courts in New York is given to a judgment record when attacked in the way this was attacked, and that the evidence does contradict the record, still we think the court erred in refusing to allow the evidence offered to be introduced.

The case of Thompson *v.* Whitman (1), recently decided by this court, settles this question we think. In that case this court, after reviewing all the prior decisions of this court upon the subject, conclude by saying (2): "But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted *to contradict the record* as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no state-

(1) 18 Wallace, 457.
(2) Page 468.

ments contained therein had any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings.

Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force. * * On the whole, we think it clear that the jurisdiction of the court, by which a judgment is rendered in any State, may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

In the case of Knowles *v.* Gaslight and Coke Company (1) this court permitted the recitals as to the service of process in the record of a judgment obtained in Indiana to be contradicted in a suit upon said record in the State of Minnesota, and referred to the case of Thompson *v.* Whitman as establishing the doctrine that in any case where a judgment is sought to be enforced outside the limits of the State where the same was rendered, it is the right of a defendant to impeach it by showing that the court which rendered the judgment had no jurisdiction over him, even though in so doing recitals in the record are contradicted.

In neither of the above cases does it appear *from the report of the case*, what "faith and credit" was given to

(1) 19 Wallace, 59.

the record sought to be impeached in the courts of the State from whence the record was taken.

But as the courts in N. J. have expressly held that a justice judgment rendered in that State, is *conclusive* in that State and cannot be attacked collaterally in any of the courts of that State (1), and as we are bound to suppose that this court knew of these decisions when rendering its opinion in the case of Thompson *v.* Whitman, we cannot see why the ruling in that case does not effectually dispose of this case.

If a party has an opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel and commits the matter to the jury, who are to find the truth.

Whether the record would have been conclusive or not upon the question of the jurisdiction of the court, makes no difference in our opinion about the propriety of the ruling of the court in refusing to allow Mr. Lybrand to introduce evidence to sustain the issue of fact before the jury.

That issue was whether he ever authorized any attorney to appear for him in the suit in N. Y.

The plaintiffs voluntarily took issue on this question of fact, instead of relying upon the record as an estoppel.

It has been held in numerous decisions (2) that where a party has an opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth.

It is true there are some decisions the other way.

(1.) VanDoren v. Horton, 1 Dutcher (N. J.) 205; see also Costner v. Styer, 3 Zabriskie (N. J.) 236.

(2) See Picquet v. McKay, 2 Blackf. 465; Redmond v. Coffin, 2 Dev. Eq. 445; Hanson v. Buckner, 4 Dana, 255; Magrath v. Hardy, 4

and that this court has never directly passed upon the question, but yet in the case Phil. W. & B. R. R. *v.* Howard (1), Mr Justice Curtis, in delivering the opinion of the court, stated that the rule was well settled as we have stated it above.

The court erred in not disposing of the issue raised by the plea of nul tiel record before rendering judgment.

The record shows that nothing whatever was done with the issue raised by the plea of *nul tiel* record.

Such an issue must be tried by the court (2), and the finding of the court upon that issue should appear.

There was the issue of whether Lybrand authorized any attorney to appear for him in N. Y., and the issue raised by the plea of *nul tiel* record, to be decided, and the record simply says (3), the jury were "sworn well and truly, to try *said issue*," without specifying what issue. It was error for the court to render judgment upon such an uncertain finding.

The court erred in refusing to allow Mr. Lybrand to amend his pleadings.

Before the pleadings in the case were settled, the defend-

Bing, N. S., 782; Carpenter v. Butler, 8 M. & W., 212; Clark v. Mix, 15 Conn., 182; Young v. Raincock, 7 Man., Gr. & S., 338: Litchfield v. Ready, 5 W. H. & G. 945; Matthew v. Osborne, 13 Com. B., 944; Eversham v. Emerson, 11 Exchr., 391; Carroll v. Collier, 22 Gratt, (Va.), 309; Cleaton v. Chambliss, 6 Rand, 86; Howard v. Mitchell, 14 Mass., 242; Bartholemew v. Candee, 14 Pick, 167; Long v. Long, 5 Watts, 103; Smith v. Elliott, 9 Barr, 345; Wright v. Butler, 6 Wend., 284; Miller v. Maurice, 6 Hill, 115; Vogt v. Winch, 2 Barn. & Ald., 662; Outram v. Moorewood, 3 East, 346; 7 Robinson Prac. 923-5; Stephen on Pldg., 220, and in note (2 b), and 1 Saund. Pl. & Ev., 63, (5th Am. Ed.,); 1 Chitty Pl., 509, and cases cited in note c. p. 478.

(1) 13 Howard, on p. 335.

(2) Gray v. Pingray, 17 Vt. 419, on p. 422, Brady v. Commonwealth, 1 Bibb. 517; Williams' notes to Saunders' R., p. 92; 2 Harris' Entries, p. 362 and 367.

(3) Page 22 of printed record.

ant, Lybrand asked leave to amend his pleadings by filing two additional pleas.

This the court refused to allow on the ground that the judgment was conclusive and could not be opened, and therefore the pleas were bad.

We have shown, we think, that the court was mistaken in regard to his view of the law bearing upon the question of Lybrand's right to impeach the judgment by showing the court did not have jurisdiction, and if the court *was* mistaken in that matter, then it was error to refuse leave to the defendant to amend his pleadings.

By the act of Congress of June 1, 1872 (1), Sec. 5, it is provided "That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform as near as may be to the practice, pleadings, and forms, and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding: Provided, however, that nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof."

And by the Practice Act in force in Illinois when this suit was tried, it is provided as follows (2):

"At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint defendant, changing the form of action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense.

(1) 17 Stat. at Large, p. 197.
(2) Sec. 23, Ch. 83, p. 286, Vol. 2, Gross, Stat. of Ills.

The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action."

"Exceptions taken to the decisions of the court (1), everruling motions in arrest of judgment, motions for new trials, *motions to amend*, and for continuances of causes, shall be allowed; and the party excepting may assign for error any decision so excepted to."

From the foregoing it will be readily seen that we can assign for error the decision of the court in refusing to allow the amendment.

In conclusion, we have simply to say that instead of Mr. Lybrand being indebted to the plaintiffs, they are indebted to him in the sum of several thousand dollars, as he will be able to show when he has an opportunity; and we think the case should be reversed and remanded, with leave to Mr. Lybrand to file his two amended pleas.

All of which is respectfully submitted.

SAMUEL W. PACKARD,
Attorney for Lybrand.

CHICAGO, *March*, 1875.

(1) Sec. 59, page 290, Vol. 2, Gross' Stat. of Ills.

In the Supreme Court

OF THE UNITED STATES.

J. SHERMAN HALL, and
J. W. LYBBAND, Plaintiffs in Error,
vs.
RALPH A. LANNING,
JAMES B. LAING, and
HENRY WELD.

ABSTRACT OF CASE.

The defendants in error commenced an action in the Supreme Court of the State of New York, against the plaintiffs in error on the 7th day of December, 1870, fol. 64, upon a money demand on contract. The complaint fol. 65, 66, states that the plaintiffs were partners, and that the defendants were partners. That on or about the 22d day of November, 1869, and at various dates between that date and the 10th day of February, 1870, the plaintiffs loaned to the defendants, $2,150, and that $1,650 was then owing on account of the first mentioned sum. For a second cause of action, the complaint alleges, fol. 66, that between November 1st, 1869, and January 1st, 1870, the defendants shipped and consigned certain goods to the plaintiffs, and plaintiffs paid $686 07 for freight, afterwards amended, fol. 77, to $741 87. The

third cause of action, fol. 66, alleges $46 00, was paid by plaintiffs for cartage. For a fourth cause of action the plaintiffs allege they paid $20,00 for insurance, fol. 66; and for fifth cause of action the plaintiffs claims $500 00 for the storage of the goods. The answer of the defendants in that trial is found at fols. 68 to 73. It admits that the defendants are partners, but denies any knowledge whether they were co-partners at the date mentioned in the complaint.

Second. Fol. 68, follows a general denial.

Third. The answer admits the consignment of goods mentioned in the plaintiffs second cause of action but denies any knowledge that the freight paid by the plaintiffs, amounted to the sum claimed by the plaintiffs.

Fourth. As to the 3d, 4th and 5th, cause of action set forth in the complaint the defendants deny any liability.

Fifth. The defendants set up a counter claim that they consigned to the plaintiffs 231 bales of hops to sell at the highest market price, that the defendants instructed the plaintiffs to sell the hops, which they failed to do, and the value of the hops depreciated, whereby the defendants lost $2,777 15, which sum with interest from May 1st, 1871, they asked Judgment against the plaintiffs.

To this answer, fol. 73, the plaintiffs reply, denying each of the allegations contained in the counter claim, except such as are admitted. The plaintiffs admit the consignment of the hops, and deny any violation of defendants' instructions.

This cause was referred by consent to a referee with power to hear and determine, fol. 75. The referee made his report, fol. 78, in which he states that he had been attended by the counsel for the respective parties, with their witnesses, and having heard the proofs finds, That the

plaintiffs were partners and that the defendants were partners, and, at fol. 81, finds the total amount due from the defendants to plaintiffs, principal and interest, is $5,350 45, and allows the defendants $2,843 63; leaving due to the plaintiffs $2,505 72, for which sum he orders judgment, which with the costs makes a total of $2,938 77, fol. 83. It appears that Oliver S. Ackley, appeared as the attorney for the defendants as partners, and put in the answer for them as a firm, fol. 68. That the issues were litigated, with the result above stated.

It further appears, fol. 2, that the plaintiffs in this judgment commenced an action thereon against the defendants in said judgment on the 12th day of November, 1872, in the Circuit Court for the Northern district of Illinois. A summons was issued out of said court against the said defendants on the 5th day of December, 1872, fol. 5. On the 6th day of December, 1872, the plaintiffs filed their declaration, fol. 6, in which they claimed $4,000 damages. The declaration states that the amount of the judgment as originally rendered was $2,938 77, principal, interest and costs, but which had been reduced by the consent of the attorneys for the plaintiffs and defendants to $2,855 77, On the 12th December, 1872, Lybrand filed an affidavit, denying that he had authorized Sleeper & Whiton to enter his appearance, fol. 11, and at the same time filed a power to Cooper, Garnet & Packard, attorneys, to enter an appearance, fol. 12. On the same day Lybrand, by his attorneys, filed pleas, fol. 13 to 17.

(1) Fol. 13, he files a plea of *nul tiel record.*

(2) Fol. 14 he files a plea that he was not a resident of New York, or within the state when the suit was commenced and judgment rendered. That he was never served with any process, summons or citation, or notice of the suit. That he never authorized any attorney to appear for him, nor entered any appearance in the cause, and that the court had no jurisdiction over him.

(3) A plea substantially the same as the second plea.

The defendant Lybrand also filed by Sleeper & Whiton a plea of *nul tiel record*, fol. 17, with notice that under the plea they would offer evidence that the judgment was irregular and void, that Lybrand was never served with process, and that the judgment was obtained by fraud, upon a pretended service of the summons. This plea was stricken out so far as it was the plea of Lybrand, and it was ordered to stand as the plea of Hall, fol. 18.

On 14th day of February, 1873, the plaintiffs filed a replication to the first plea of Lybrand and to the plea of Hall, fols. 19 to 23, stating there is such a record of judgment as is stated in their declaration.

On 22d Feb., 1873, fol. 23, the plaintiffs filed a replication to the 2d and 3d pleas of Lybrand, setting up that Ackley appeared for Lybrand in the New York suit, and that he was duly authorized so to appear. The second replication to the second and third pleas of Lybrand sets up that process was served on Hall, who employed Ackley to appear, Hall having authority to make the defence for himself and Lybrand, and that Ackley accordingly appeared for both defendants.

The third replication, fol. 26, states that it appears by the record of the judgment recovered in New York, that Ackley, the attorney for Hall and Lybrand, stipulated that the judgment be reduced.

Replication No. 4, fol. 28, to the second and third pleas of Lybrand, states that the court that rendered the judgment had jurisdiction, the defendants Hall and Lybrand having appealed in said court by their attorney.

To these replications Lybrand filed demurrers and rejoinders, fol. 29, as follows: to the first replication to the second and third pleas, that Ackley was not duly

authorized to appear for defendant Lybrand, and to second replication that Ackley was not authorized by Lybrand nor by Hall by authority of Lybrand, and general demurrer to the third and fourth replications, fols. 32, 33.

Leave was given to Lybrand to withdraw the demurrer fol. 34, and rejoinders were filed in place of the demurrer, fols. 35 to 37.

On the 28th of February, 1873. Lybrand made a motion to file two additional pleas, based on the affidavit of one of his attorneys, fols. 39 to 43. The pleas are found at fol. 43 to 53, and alleges that Lybrand at the commencement of the action in New York, was a resident of Illinois, and was not in New York. That he was not served with process, and never authorized any one to appear for him. Then follows an averment as to a statute in New York, that service of summons may be made on one of two or more joint debtors in an action against such joint debtors.

That by the law of New York, the joint debtor not served may make any defence, as if he had been originally served with a summons. That Hall & Lybrand had a counter-claim or set off to the plaintiff's claim. The second plea is substantially the same as the first except that instead of the plea or set off it contains an allegation that Lybrand was not indebted to plaintiffs, and that such plea might have been set up in the New York suit.

The plaintiffs filed demurrers to Lybrand's rejoinders fols. 53 to 55, which were overruled, fol. 56.

On the 5th day of March, 1873, the cause was tried before the court and a jury, and a verdict rendered for the plaintiffs for $2,855.77, and $83.25 damages, fol. 57. Lybrand moved for a new trial.

(1.) That the court admitted improper evidence.

2.) That evidence was improperly excluded.

(3.) That court erred in instructing jury that record of New York judgment could not be contradicted, explained or avoided.

(4.) Error as to rate of interest.

(5,) and (6.) General errors in the instructions.

This motion was overruled, fol. 59. The bill of exceptions is at fol. 60, and contains the record of the judgment roll in the New York suit, and consists of a consent, signed by the attorneys for the parties, correcting the amount of the judgment, fol. 62. The order of court, fol. 63. The summons, fol. 64; complaint, fol. 65; the answer, fol. 68; the reply, fol. 73; order of reference, fol. 75; order of referee amending the complaint, fol. 76; report of the referee, fol. 78; the postea, fol. 83; and the certificate of exemplification, fol. 84. The objections of Lybrand to the introduction of the record, fol. 85, was based entirely on certain interlineations in the certificate. Lybrand offered to prove at fol. 86, that he was never a resident of the State of New York. That no process was served on him, and that he never authorized any attorney to appear for him, and never authorized any one to employ an attorney to appear for him.

This offer, fol 86, is part of a general offer to which a general exception was taken fol 87, and a part of the offer being to prove incompetent matters the whole was properly excluded.

4 Cowen 292
5 Wend 148
28 Ny. 438
5 Robt 265
4 Barb 256

FIRST POINT.

The evidence offered by Lybrand that he did not authorize any attorney to appear for him in the New York suit, does not constitute a defense to this action, and the assignment of error in that respect is untenable.

I. It appears by the judgment record put in evidence, that Hall & Lybrand were partners. It is alleged in the

complaint in the New York suit, and admitted by the answer, that defendants were partners, fol. 65, 68, and so found by the referee, and this finding must be binding on the firm, as proof of a firm liability, and therefore conclusive of a partnership in the transactions involved in that action. That the suit in which the judgment was recovered, related wholly to their partnership transactions; and Lybrand offered to prove in the present suit, that he was a partner with Hall, and that the partnership had been dissolved, and that he was absent from New York pending that suit, fol. 86.

That Ackley, an attorney, put in an answer for the firm of Hall & Lybrand, Ackley, the attorney, verifying the answer. Ackley states, p. 27, fol. 72, that he had possession of the account of sales and copy of correspondence between plaintiffs and defendants. That the issues were litigated and finally determined, so that a judgment was ordered for the plaintiffs in that suit against Hall & Lybrand for a balance of $2,505 72. The answer in that suit consisted of a general denial, and a counter claim. Hall & Lybrand make this counter claim as co-partners, and being in the nature of a cross suit, which either partner could commence, it is evidence that they were partners.

II. The question is presented whether one partner in a suit begun against himself and his co-partner in regard to partnership transactions which are within the scope of the partnership, the co-partner being absent from the state, can direct an attorney to defend the action for the firm, by denying the allegations in the complaint and pleading a counterclaim.

It is clear that Hall could have commenced an action on the counter claim, in behalf of himself and Lybrand, without any express authority from Lybrand, and Lanning & Co. could have pleaded the claim they sued on in New York, as a set off or counter claim; and if Hall & Lybrand had been defeated in that suit and judgment rendered against them on their ~~counter~~ claim, such judgment would be binding on Lybrand. The New York suit was as much an action against Lanning & Co. as for them.

III. The solution of the question whether Hall could direct Ackley to defend the suit brought against the firm of Hall & Lybrand, depends much on what is the foundation of partnership authority.

(*a.*) We say, that partners are a commercial personality. Each partner, in all things relating to the firm transactions, represents and acts for the firm.

Parsons, in his work on partnership, 2d edition, page 171, (marginal) says: "We consider the individual partner, when conducting the affairs of the partnership, not so much acting for himself, because of his own interest, and then for the rest by their authority, but as acting for and representing a commercial personality." Each partner is an integral part of a commercial unit, which is not an aggregation of the separate individual authority of each and every partner, but is rather a quasi corporation. Each partner within the scope of its business representing the firm, or stands as the firm, when he solely acts, unless restricted by agreement.

(*b.*) The authority of each partner does not rest simply on an implied agency, derived from the co-partner, but springs from the very constitution of the commercial relation, and depends as well upon the property relation of the partners, each partner having a legal title to the whole property.

Parsons on Partnership, page 171.

Chief Justice Parker held, in Greely *v.* Wyeth, 10 N. 16, "That the authority of a partner is much more extensive than that of a mere agent."

IV. It is clear that one partner may make contracts for the firm, which not only will bind all the partners to the extent of partnership assets, but which may lead to a per-

sonal liability of his co-partners. This ultimate individual liability of the partners is a necessary legal result of the exercise of the partnership authority by either partner.

V. In the New York suit, Hall representing the firm, could employ Ackley for the firm to defend its interests.

(*a.*) He could not defend the suit for the firm without putting in an answer for the firm.

(*b.*) In an issue between himself and the plaintiffs in that suit, Hall could not have used the counter claim so as to recover a judgment on the counter claim in excess of the plaintiff's claim, for such a recovery, unless binding on Lybrand as well as Hall, could not be binding on Lanning & Co.

(*c.*) The authorities support the contention that Hall could defend for the firm.

It is presumptively for the benefit of the firm that the suit is defended.

In Winship *v.* The Bank of the United States, 5 Peters, 561, Chief Justice Marshall says: "A partner has power to transact the whole business of the firm, whatever that may be, and consequently to bind his co-partner in such transactions as entirely as himself. This is a general power essential to the well conducting of business which is implied in the very existence of a partnership."

Mr. Parsons says, in a note, page 175, (margin,) Parsons on Partnership, that in an action against the firm, one partner may enter an appearance for the rest, and cites:

Harrison *v.* Stickney,
7 T. R., 208, Dampier, Arguendo.

Bennett *v.* Stickney, 17 Vermont, 531.
Spaulding *v.* Swift, cited in 17 Vt., 533.
And Taylor *v.* Coryell, 12 S. & R., p. 250.

In Bennett *v.* Stickney, the Supreme Court of Vermont held that when a suit is commenced against a firm, one of the partners has power to employ an attorney to attend to the suit on the part of the defendants; and that an appearance entered in a suit by the attorney thus employed, will be binding and conclusive on the other partners.

In Taylor *v.* Coryell, the Supreme Court of Pennsylvania says: That an appearance of one partner for himself and his co-partner, was a good appearance for all, it being consistent with the general authority of a partner.

Mr. Collyer, in his work on partnership, §§ 441 and 678, and note, lays down the rule that "If an action be brought against several partners, one may enter an appearance for the rest, which may, in its consequences, lead to a judgment against all." Citing the same cases as Parsons.

Lindley on partnership, page 226, (margin,) cites numerous English cases in support of the right of one partner to appear for the rest in judicial proceedings, and states that such authority does not rest principally on agency.

In Everson *v.* Gehrman, 10 Howard, Pr., R., 301, the General Term of the Supreme Court of New York, discuss the power of partners. Judge Mitchell says: "The authority of partners is generally employed in giving acknowledgments of indebtedness or of payments and promises or obligations to pay. They may also prosecute and

defend suits. This is on the assumption that they are acting for and under the sanction of their co-partner. No such assumption will arise where they and the plaintiffs in the suit know that the partner is opposed to their proceedings."

This was a case where one partner confessed judgment against the firm contrary to the wishes of his co-partner. The same doctrine is approved by the same court in Brimly *v.* LeGal, 19 Barbour, 594. And it is there said that one partner has power to act in suits for his co-partner, when not contrary to the express or implied wish of his co-partner; and stress was laid on the fact, that the co-partner was present, and had notified the plaintiff that he alone had the management of the business.

This power is also asserted in Gard *v.* Clark, 29 Iowa, 189.

This agrees with the rule laid down by Watson in his work on Partnership, page 167, that the liability of partners is commensurate and co-extensive with their rights.

It is said that the power to arbitrate is an exception to the general power of a partner. He may create a debt, pay a debt, compromise a debt, or in good faith deal with it in any way. The only thing he cannot do is to submit the debt to arbitration. After discussing this seeming exception, Mr. Parsons says: "We have some doubts whether any of our courts might not be expected to sustain such a submission if it were unobjectionable in itself."

Parsons on Partnership, page 171.

See Boyd *v.* Emmerson, 2 A. & E., 184, argument of

counsel: "The foundation of this exception is not in the want of power of one partner to submit to arbitration, but in the rule which has prevailed until recently, that the courts would not enforce an agreement to arbitrate."

Parsons on Partnership, p. 171, margin.
Story on Partnership, sec. 114.

Submission to arbitration by one partner, when not under seal, is binding on the co-partner.

Southard *v.* Steel, 3 T. B. Monroe, 435.
Taylor *v.* Coryell, 12 S. & R., 243.

Therefore, as a mere question of power, one partner may submit to arbitration.

In Olwell *v.* McLaughlin, 10 N. Y., Leg. Obs., 316, it was held that one partner, who bonafide admits service of process for both, upon which judgment is entered, will not be set aside on motion of the partner who did not consent to the proceedings.

The following cases in New York are to the point, that where there is no collusion nor any dissent by the co-partner at the time, one partner may defend for both, and are cited in Emerson *v.* Gehrman, *supra*.

Lippman *v.* Judson, 1 Code, R. (N. S.) 161, note.
Hammond *v.* Harris, 2 How. Pr. R., 331.
Crane *v.* French, 1 Wendell, 311.
Grazebrook *v.* McCrudie, 17 Wend. 437.
Blodget *v.* Conklin, 9 How., P. R. R., 442.

The following examples of the power of a partner tends to establish the authority claimed.

(*a.*) One partner may release a cause of action on

which suit has been brought by the firm, and the release will operate as a bar to the action and bind the co-partner.

Barker v. Richardson, 1 Young & J., 362.
Acton v. Booth, 4 J. B. Moore, 192.
Furnival v. Weston, 7 J. B., Moore, 356.
Jones v. Herbert, 7 Taunton, 421.
Wilson v. Mower, 5 Mass., 411.

(*b.*) One partner may suspend proceedings in an action commenced by the firm.

Harwood v. Edwards, cited in Gow. Part., p. 65.
Lozing v. Brackett, 3 Pick, 403.

(*c.*) One partner may, in bankrupt proceedings prove a debt, vote for the choice of assignee and sign the certificate in behalf of the firm.

Exparte Mitchell, 14 Ves., 597.
Exparte Shaw, 1 Glyn & J., 129.
Exparte Hall, 1 Rose, 2.
Exparte Bignold, 2 Mont. & A., 655.

(*d.*) Notice by one partner in legal proceedings will bind the firm.

Fitch v. Stamps, 6 How. (Miss.) 487.
Mahew v. Eames, 1 Carr. & P., 550.
Coll on Part., sec. 442.
Bignold v. Waterhouse, 1 M. & S., 259.
Alderson v. Pope, 1 Camp, 404.
Bromley v. Currier, 1 D. Chip., 315.
Figgins v. Ward, 1 C. & M., 424.
Center v. Southall, 3 Mees. & W., 128.

(*e.*) Each partner has power, after a dissolution, to sign a bankrupt's certificate, which releases the debtor and discharges his future acquisitions.

Robbins v. Fuller, 24 N. Y., 570, citing.
Bissell on Partnership, page 90.

This is the highest exercise of power.

Lord Eldon in exparte Hall, 17 Vesey, 62, decided the point, and held that as to the debt discharged the partnership was not dissolved.

(*f.*) It is well settled that one partner may release a firm debt before or after dissolution.

Robbins v. Fuller, supra.
Acton v. Booth, 4 J. B. Moore, 192.
King v. Smith, 4 Carr & P., 106.
Cram v. Cadwell, 5 Cowen, 493.
Murray v. Mumford, 6 Cowen, 441.
Napier v. McLeod, 9 Wendell, 120.

One partner may, before or after dissolution, acknowledge, in the partnership name, a balance due from the firm.

Ide v. Ingraham, 5 Gray, 106.

And may make admissions binding on his co-partner.

Beardsley *v.* Hall. 36 Conn., 270.
Freligh *v.* Whitaker, 22 Ohio St., 606.

(*g.*) If two partners are garnishees and one answers for both, and acknowledges a joint indebtedness, judgment may be entered against the firm.

Anderson v. Wanzer, 5 How., (Miss.) 587.

And the late Justice Nelson held, in St. John v. Holmes, 20 Wendell, 609, where one partner executed a warrant of attorney for both, that the court would not set aside the judgment unless the attorney is irresponsible.

The same doctrine is approved in Lahey v. Kingon 13 Abbott, 192.

VII. If it is claimed that an appearance by one partner for his co-partner in a suit brought against the firm, may result in a judgment against such co-partner, we answer that such a claim is insufficient to deprive the partner making such appearance of authority to make the same. It is clear that one partner has power to represent both himself and his co-partner in all matters within the scope of the partnership. This power to contract necessarily carries with it the power to create a contract liability against both partners. If a suit is brought upon such contract by the other party to the same, why cannot either partner enter an appearance for both, for the purpose of defending the suit bona fide ?

(*a.*) It is in the very matter of restricting or defeating this contract liability, and not of admitting or confessing any liability, that the appearance is made by Hall.

(*b.*) The liability is a partnership liability. Hall & Lybrand are a commercial personality, and each partner is liable in *solido*.

Mason *v.* Eldred, 6 Wall, 231.

They are joint tenants.

Kendal *v.* Wood, L. R. (6 Ex.) at p. 251.

(*c.*) If the partnership liability is established in the suit, the partnership assets are primarily liable in

equity in discharge of the recovery, and to the extent of the firm assets, Hall was certainly acting within the scope of his authority. It would seem that if the authority exists in one partner to make the contract out of which the suit grew, that either partner has authority to enter an appearance for the firm. This must be so, as the authority to contract includes the power to create an individual liability of each partner.

(*d.*) If, in the bona fide defence of the firm and its assets, it happens that a judgment is recovered against the partners, and there should not be firm assets sufficient to pay the judgment, the personal liability of Lybrand upon the judgment, is only a necessary legal result of the authority of each partner to contract for the firm. The power of one partner to represent the firm or appear for it is co-extensive with the power to contract.

VIII. Lanning & Co. were innocent parties. They had the right to rely on the appearance put in by Hall. Hall was, as partner, general agent for Lybrand, having an apparent authority. If Lybrand was also innocent he should suffer rather than Lanning & Co., having made Hall his partner, and thereby held him out as having authority. Very injurious results would follow if Lanning & Co. could not rely upon the appearance of Ackley. Partnership defences could be again interposed and litigated by Lybrand.

Therefore the offer of Lybrand to prove that he never authorized any one to employ an attorney, did not go far enough. He should have offered to prove that Hall's authority as partner was restricted by agreement, and that Lanning & Co. had notice of such restriction.

Each and every exercise of partnership authority by one partner in making contracts in behalf of the firm, tends to create an ultimate individual liability of the other partner. This does not, however, limit the power of one partner to represent his co-partner. The partnership relation continues between the partners even after judgment against one partner, for upon payment by him he has the right of contribution against his co-partner. The partnership authority must therefore continue until the final discharge of the joint liability.

IX. The appearance by Hall was an appearance by the firm ~~and make one sentence~~. If it were conceded the judgment recovered in New York could not be enforced personally against Lybrand by execution, it would not follow that Hall could not employ Ackley to appear for the firm for the purposes of putting in an answer.

In this action on the judgment, it is sufficient that Hall had an authority to represent the firm in the New York suit in which judgment was recovered. This gave the New York Court jurisdiction over Lybrand. This is so even if Hall's authority extended only to representing Lybrand to the extent of firm assets. If Lybrand, as partner, is bound by the appearance of Hall to the extent of firm assets, the judgment is valid, and an action may be maintained on the judgment against Lybrand as well as Hall. There may be firm assets in Illinois. The question is not one therefore of jurisdiction, and the record is conclusive of the firm liability. *No defence can be made by Lybrand in the present suit, which was open to Hall, representing the firm, to make in the New York suit. It appears, however, by the record, that all the pleas of Lybrand are partnership defences. No plea is made nor offer of evidence to prove any defence that is personal to Lybrand, as that he was not a partner.*

We say therefore that Hall had authority to appear for the firm for the purpose of setting up any partnership defences the firm had to the plaintiffs' claim.

X. It is claimed by the plaintiffs in error, that Lybrand lived out of the State of New York at the time suit was pending there. This gave Hall an authority to appear for Lybrand, as well as himself.

Bennett *v.* Stickney, 17 Vermont., 531.
Coler *v.* Gurney, 1 Madd., 187.
Carrington *v.* Cautillon, Bunb., 107.
Coll. on Partnership, sec. 441.

XI. *The plaintiffs, as creditors, had the right to assume that Hall, acting for the firm, had competent authority. If he acted without authority, Lybrand's remedy is against Hall.*

SECOND POINT.

If the partnership was dissolved, Hall still had the power to appear for the firm.

Wood *v.* Braddick, 1 Taunton, 104.
per Lord Mansfield.
Pritchard *v.* Draper, 1 Russ & Myl, 191.

It was held in these cases, that the admission of one partner after dissolution is binding upon his co-partner in respect to any transactions which occurred when the part-

nership was pending. The same rule is laid down in Vinal *v.* Burrill, 16 Pick., 401 ; Bridge *v.* Gray, 14 Pick., 55 ; Simpson *v.* Geddes, 2 Bay, 533 ; Garland *v.* Agee, 7 Leigh., 362 ; Woodworth *v.* Downer, 13 Vt., 522.

In general it is held, in Butchart *v.* Dresser, 4 de Gex. M. & G., 542, that "Each partner has, after dissolution, full authority to receive and pay money on account of the partnership, and the same authority to deal with the firm property. If not, it would be necessary, at the moment of dissolution to apply for the appointment of a receiver.

The rule in this country is that the dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle and pay those before created.

Darling *v.* March, 22 Me., 184.

And either partner after dissolution may acknowledge in the partnership name a balance due from the partnership.

Ide *v.* Ingraham, 5 Gray, 106.

And in Penn it is held that a partner may, after dissolution, borrow money to pay partnership debts.

Estate of Davis, 5 Wharton. 530.

And may renew the notes of the firm.

Brown *v.* Clark, 14 Penn St., 469.

Or give notes in the firm name in payment of debts.

Robinson *v.* Taylor, 4 Barr, 242.

And as the power of each partner must be equal to that of any other partner, unless modified by agreement, this power of one partner of winding up the affairs of the firm must be complete.

Therefore the settling partner may pay and receive payment. Butchart *v.* Dresser, supra. May sell goods consigned to the firm.

Herberton *v.* Jefferson, 10 Barr., 124.

And may compromise debts in any way that does not indicate fraud.

Bass *v.* Taylor, 34 Miss., 342.

He has power to draw a bill upon a debtor of the firm, and sue him in the firm name.

King *v.* Smith, 4 Carr. & P., 108.

To release a debt due to the firm.

Napier *v.* McLeod, 9 Wend., 120.

To pledge property, to raise money to pay for the same.

Butchart *v.* Dresser, supra.

To collect, compound and release debts of the firm.

Huntington *v.* Potter, 32 Barb., 300,
and cases cited.

A liquidating partner can make new promises as to former business, which will bind his co-partners.

Reppert *v.* Calvin, 48 Penn St., R., 250,
and cases cited.

In general dissolution has no effect on the rights of the firm against third persons or of third persons against the firm ; and such actions are what they are before dissolution.

Parsons on Part., p. 398, margin,
p. 412, 2d Ed.

And does not destroy the joint tenancy in the settlement of previous transactions.

Murray *v.* Mumford, 6 Cow. 441, S. P. 24 N. Y., 570.

And in a suit against a firm, after its dissolution, all the partners must be sued.

Dobbin *v.* Foster, 1 Car. & K., 323.

The conclusion to be drawn is, it is submitted, that a partner after dissolution has the same power as before in regard to suits brought by or against the firm ; and that if Hall had the power to authorize an appearance for the firm, if the firm had not been dissolved, he still had such power, after the dissolution.

THIRD POINT.

The cases which hold that fraud, actual or constructive, which goes to the jurisdiction cannot be pleaded in bar but may be pleaded to a judgment as an equitable defence, allow such a defence only when the defendant has a defence, and will be injured if such defence is not allowed.

Mark v Fore 57 Mo

The only defence that Lybrand sets up and offers to prove in this suit. is the same defence set up by Hall for the firm in the New York suit. This counter claim in the New York suit was a firm defence, and was properly pleaded, and determined in that suit on the merits. It is clear that Lybrand has suffered no real injury, and his contention is reduced to the point that he did not conduct the defence personally. We say that Hall had the right to conduct that defence for the firm, for the reason already stated in points 1 and 2.

Again.—The counter claim set up by Lybrand, in this suit, and which was set up by Hall in the New York suit, and there determined, cannot be used as a defence by Lybrand here. If Hall & Lybrand had succeeded in the defence in the New York suit, and recovered a judgment against the plaintiffs therein, Lybrand could not reopen that litigation in this suit. If he can then it must follow that in all suits brought by creditors against co-partners, and one partner conducts the defence, the creditors are liable to fresh litigation at the instance of the other partner whether the result of such litigation were favorable or adverse to the creditors. The great danger and injury which must result from a denial of the authority of one partner to represent the firm is thus apparent.

FOURTH POINT.

The plaintiffs had the right to rely upon the appearance of Ackley; and such appearance is binding on the defendants unless fraud or collusion is shown.

Denton *v.* Noyes, 6 John R., 297, was decided in 1810, and is one of the earliest cases; an appearance by an attorney of the court without warrant, is good as to the court, and the defendant has an action against the attorney: otherwise, if there be any fraud or collusion between the plaintiffs attorney and the attorney for the defendant, or, if the attorney for the defendant be not responsible, Chief Justice Kent, says: "By licensing attorneys, the courts recommend them to the public confidence, and if the opposite party, who has concerns with an attorney in the business of a suit, must always at his 'peril', look beyond the attorney, to his authority, it would be productive of

great inconvenience ; the mere fact of the appearance, is deemed enough for the opposite party and for the court. If his client's denial of authority is to vacate all the proceedings, the consequences would be mischievous." The imposition might be intolerable. The Chief Justice then discusses the cases that had been decided at that time and says : "There is no distinction in principle between the case of an attorney appearing without authority, and suffering or confessing judgment for a party before or after that party had been served with process."

Grazebrook *v.* McCreedie, *et al*, 9 Wendell, 439. The defendants were partners, one of whom took the declaration served on him to an attorney and told him that there was no defence, and that he should give cognovits, which the attorney did for both of the defendants. The plaintiff's attorney entered a judgment on the cognovits. The partner not served moved the court to set aside the judgment, principally on the ground of collusion and fraud. This was denied by the plaintiffs, and the court disregarded the allegations, and stated the question to be whether one partner has power to employ an attorney for all the copartners not brought into court, and whether a judgment confessed by such an attorney is regular ; and although it was intimated that one partner could not confess a voluntary judgment against both without a suit regularly instituted against both, and both actually or by operation of law brought into court. The court, by Chief Justice Savage, further say : " At first blush it seems strange that that can be done indirectly which cannot be done directly, and it would seem that the same course of reasoning which led to the conclusion that a judgment confessed by Senior himself would have been void against M'Creedie, should also pronounce that void, confessed by the attorney ; but here we are met by Denton *v.* Noyes, 6 Johns R., 296. In that case the court said " The judgment in this case is regular on the record." So it is here. It is said in Denton *v.* Noyes. " If the attorney has acted without authori-

ty the defendant has his remedy against him." The court denied the motion to set aside the judgment on the authority of Denton *v.* Noyes, and permitted the defendant McCreedie to plead. Several cases are cited by the court, and the conclusion to be derived is, that the case of an attorney appearing without authority is distinguishable from that where a judgment is obtained when there has been no service on the party. That the plaintiff and his attorney relied upon the appearance of the attorney who appeared for the defendants, and were equally innocent, as the defendant who did not authorize him. The defendant was allowed to plead to the merits, but the judgment was not held to be void. The jurisdiction of the court rendering the judgment was upheld.

This seems necessarily to follow from the public nature and authority of an attorney. He is an officer of the court, and the reasons given by Chief Justice Kent, in Denton *v.* Noyes, have great force.

Denton *v.* Noyes is the earliest case in this country upon this question; and discusses principles and authorities in a very able manner; and the decision is that an appearance of an attorney cannot be questioned, but the party injured must sue the attorney if responsible. There is no offer in this case to show that Ackley is irresponsible.

Post *v.* Haight, 1 Howard Pr. R., 171.

In Brown *v.* Nichols, 42 N. Y., 27, this question came before the New York Court of Appeals, and the law of that State was finally settled by its highest court. In that case Solomon G. Havens, of Buffalo, appeared for one Patchen, in a foreclosure suit, without the knowledge or consent of Patchen. Seven of the judges out of eight held that as Mr. Havens was a responsible attorney the judgment must stand, and the party seek his remedy against the attorney, who, without authority, has appeared for

him. It was further held that the party should always seek relief for an unauthorized appearance in the suit in which it has been put in, where the rights and equities of the parties can best be protected.

The court say this rule is not based entirely upon the law of agency but upon reasons of public policy and justice, which are discussed in Denton *v.* Noyes, and in Hamilton *v.* Wright, 37 New York, 502, by Judge Woodruff.

Justice Ingalls, who dissented on other grounds, says that upon a direct application to the court, in some instances, the court have granted relief where an attorney appears without authority, and cites :

Ellsworth *v.* Campbell, 31 Barbour, 135.
Blodget *v.* Conklin, *supra.*
Denton *v.* Noyes, *supra.*

The learned judge further says : " In the following cases this question is discussed and decided both in regard to causes where there was as well as where there was not service of process upon the party for whom the attorney appeared without authority from such party, and they fully sustain such appearance.

Hamilton *v.* Wright, 37 N. Y., 502.
Am. Fire Ins. Co. *v.* Oakly, 9 Paige, 496.
Denton *v.* Noyes, *supra.*
Jackson *v.* Stewart, 6 Johns, R. 34.
Republic Mexico *v.* De Arongoiz,
5 Duer, 643.

Both the Chief Justice and Justice Ingalls say that that law is well settled upon principle and authority.

(1.) The attorney is an officer of the court acting under oath.

(2.) A contrary rule is impracticable. The title to

real estate depends upon the records of the courts. It would be impossible in all cases for parties to ascertain whether the attorneys of record had due authority.

The court says: "The effect of such a rule would be to create positive distrust as to the soundness and regularity of titles."

"I think the objections on grounds of hardship and danger urged against upholding such appearance by an attorney, rests more in theory than practice."

To the same effect is

Lakey *v.* Kingon, 13 Abbott, Pr. R., 192.

In Hamilton *v.* Wright, *supra*, Judge Woodruff says: "That an appearance by attorney, whether by plaintiff or defendant, if there be no collusion, may be recognized by the adverse party as authentic and valid, I deem important to the safe administration of justice, and well founded in the scheme and plan of such administration, in England and this country ever since such officers were commissioned to represent litigents in the courts."

He says further, "They are officers of the court, their commissions declare them entitled to confidence. The court has direct control over them, and this is a guaranty of their fidelity."

The general rule, that the appearance of an attorney for defendant is always deemed sufficient for the opposite party and for the court, is sustained by universal consent of the courts in this country.

Tully *v.* Reynolds, 1 Ark., 99.
Hagle *v.* Shattuck, 21 Cal., 51.
Dalton City Co. *v.* Dalton Manu. Co., 33 Ga., 243.

Williams *v.* Butler, 35 Ill., 544.
Hawes *v.* Galbraith, 43 Ill., 309.
State *v.* Carothers, 1 Greene (Iowa) 464.
Succession of Patrick, 20 La Ann, 204.
Kent *v.* Richards, 3 Md. (Ch.) 392.
Beckley *v.* Newcomb, 24 N.H.(4 Fos.)359.
Norri *v.* Douglas, 5 N.J.L.(2 South) 817.
Jackson *v.* Stewart, 6 John, 34.
Hench & Todhunter, 7 Har.& J.(Md.) 275.
Harding *v.* Hull, 5 id. 478.
Mamiskeyson *v.* Dorsett,
5 Har. D. G. (Md.) 374.

And in this court the point is ruled in.
Ross *v.* Hills, 3 Dallas, 331.

The recent cases of
Thompson *v.* Whitman, 18 Wallace, 457 and
Knowles *v.* Gas Light & Coke Co.,
19 Wallace, 58.

Hold that the jurisdiction of the court rendering judgment, may be inquired into in an action on the judgment in another state. For the reasons stated on page 17, point sub. div. IX., the jurisdictional question does not arise in this case.

If the court had any jurisdiction whatever, the judgment is valid.

The rule, as established in these cases, is especially applicable when one partner is abroad. In such a case the rule in equity is, that service of subpoena upon one is good service upon both.

Coles *v.* Gurney, 1 Madd., 187.
Lansing *v.* McKellup, 7 Cowen, 416.

Hills *v.* Ross, 3 Dallas, 331.
Also cited in 9 Wendell, 441.

An appearance in a suit in a court of a sister State, although unauthorized, is not a defence to an action on the judgment.

Bank of Middleton *v.* Huntington,
13 Abbott, Pr. R. 402.

This was an action in New York on a Judgment recovered in Pennsylvania. The defence was that there was no personal service upon the defendant, but that an attorney appeared for them. The court cite Acott *v.* Israel, 2 Binney, 145, which was parallel, and held that an appearance could not be questioned in the suit on the judgment. The court say, "If he appeared without authority the remedy is by an application to the court of Pennsylvania to open the judgment, or an action against the attorney."

This rule should apply at least to a case like this, where the court has jurisdiction of the parties, for any purpose.

If it should be said that the rule as to the effect of the appearance of an attorney in New York, does not apply in an action on that Judgment in Illinois, we reply, that no valid reason can be given for any distinction. The status of an attorney as an officer of the court, his duties, authority and relations to his client, are the same from Maine to California; certainly wherever the common law prevails. The decisions are uniform or nearly so. The status not being determined by local law, why should not his appearance in New York, if valid there, be valid also in Illinois? It would have been valid there, if the suit had been brought there. In cases of substituted service, of parties, under local laws, not according to the course of the common law, it may well be that such service has no extra territorial validity. But the case of an attorney is entirely different. He is the recognized officer of all

common law courts, to prosecute and defend actions, and there is nothing local or territorial in the effect of his official action; for wherever the judgment is enforced his agency in the suit in which the judgment was recovered is recognized in every step taken in that suit. We say that it is the common law of this country, that the appearance of an attorney who is responsible, is valid as to the court, and may be relied upon by the other party.

I. The plaintiff in the New York Judgment, on which the action at bar was brought, having received a notice of appearance of the defendant Lybrand, it was unnecessary to serve the summons. Code of Procedure §139, Rule 7, Supreme Court of New York. Mahoney *v.* Penman, 4 Duer, 605, and note, to page 606.

Keyes *v.* Moultrie, 1 Bosworth, 631.

II. The authority of Hall to represent the firm depends on the law of the place where the contract of partnership was formed, and the firm carried on their principal business.

Savigney's International law, (Guthrie's Ed.) p. 190, 191.

It does not distinctly appear whether the firm of Hall & Lybrand carried on business in Illinois or New York. The goods were consigned from Chicago to Lanning & Co., New York. As a matter of fact their place of business was Chicago. Whether New York or Illinois, the law of each of those States authorizes one partner to appear for the firm.

FIFTH POINT.

The first, second, third and fourth errors assigned (fols. 91 and 92,) are untenable. The court properly refused to allow the defendants to substitute the two special pleas in place of the pleas they had already filed, and cannot be reviewed here.

SIXTH POINT.

The motion for a new trial was properly refused so far as relates to the question of the validity of the appearance in the New York suit, on the grounds and for the reason discussed in the first and second, third and fourth points ; and so far as such motion was based on other grounds that such grounds were insufficient in law to warrant a new trial.

SEVENTH POINT.

The fifth error alleged (fol. 93) is untenable by the change in the Constitution of the State. The Supreme Court is divided into departments, and the presiding Justice is entirely competent to sign

the exemplification of the record. No offer was made to show the record was not in due form, or that the interlineation was not made by the justice or by the clerk by his authority. The objection is untenable.

United States *v.* Amedy, 11 Wheaton, 392.

EIGHTH POINT.

That the error assigned that the plea of *nul tiel record* should have been disposed of before the trial is untenable.

The judgment should be affirmed with costs.

SIDNEY S. HARRIS,
Counsel for Defendants.